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No. 192

In the Supreme Court of the United States

October Term, 1932.

DAVID BURNET, Commissioner of Internal Revenue,

Petitioner,

vs.

ALUMINUM GOODS MANUFACTURING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWIN S. MACK,
ARTHUR W. FAIRCHILD,
J. GILBERT HARDGROVE,
Counsel for Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTIONS TO GRANTING OF WRIT.

Respondent opposes the granting of a writ of certiorari upon the following grounds:

1. The decision of the Circuit Court is consistent with decisions in other courts and has already been accepted as authoritative in other cases.

Consistent with the decision in this case, are the following cases which preceded it:

Remington Rand, Inc. vs. Commissioner, 33 F. (2d) 77 (C. C. A. 2) certiorari denied 280 U. S. 591.

United Publishers' Corporation vs. Anderson, 42 F. (2d) 781 (S. D. N. Y.).

Wilmington Steamboat Company vs. Sturgess, 52 F. (2d) 210 (D. C. N. J.) affirmed 55 F. (2d) 831 (C. C. A. 3).

American Printing Company vs. United States, 53 F. (2d) 98 (D. C. Mass.).

Since the decision in the instant case was made, it has been followed and cited with approval by the Circuit Court of Appeals for the Fourth Circuit in *Burnet vs. Riggs National Bank,* 57 F. (2d) 980 (C. C. A. 4), and also by the United States Board of Tax Appeals in *Houghton & Dutton Co. vs. Commissioner,* 26 B. T. A. 52, and in *Emerson Carey Fibre Products Co. et al vs. Commissioner,* 26 B. T. A. ..... (July 19, 1932, Dockets 36381, 36382).

The only decision which petitioner claims is substantially in conflict is that of the Court of Claims in *Utica Knitting Company vs. U. S.,* 68 Ct. Cls. 77 (certiorari denied 281 U. S. 739), which decision has been distinguished on similar facts in *H. Liebes & Company vs. Commissioner,* 23 B. T. A. 787.

2. The issues arise under a statute long since repealed. They are not of general importance and involve no great principle.

The petitioner or his predecessors in office have continually sought to deny losses, as here, and inconsistently to tax gains arising from liquidation or the sale of the stock

of an affiliated corporation but the courts have uniformly adopted the principle which is accepted by the court below and have allowed the deduction of losses and permitted the taxation of gains.

The instant case, relating to taxable income for the year 1917, has been in continuous litigation for over ten years, despite the efforts of the respondent to prevent delay.

3. The decision of the Circuit Court of Appeals is correct and recognizes substance as well as form.

The petitioner's position seeks a narrow refinement, and that not of the statutes, but of the departmental regulations which refinement the court below refused to accept.

ARGUMENT.

I.

The Decision of the Circuit Court is Consistent with Decisions in Other Courts and has Already been Accepted as Authoritative in other Cases.

A.

The decisions claimed to be contrary to the case at bar have been distinguished.

The principal reason advanced by the petitioner for granting the writ is that the decision of the court below is in conflict with the decision of the Court of Claims in *Utica Knitting Company vs. U. S.*, 68 Ct. Cls. 77 (certiorari denied 281 U. S. 739), and that to a limited extent it is in conflict with *Auto Sales Corporation vs. Commissioner*, 43 F. (2d) 931 (933) (C. C. A. 2). The court below in its opinion cites six cases from other courts (including the Circuit Court of Appeals for the Second Circuit, three separate United States District Courts and the United States Board of Tax Appeals) and these cases are discussed in the brief of the petitioner in an attempt to distinguish them from the instant case, despite the fact that these alleged distinguishing points were fully presented to the court below and that the court found the cases undistinguishable. These six harmonious cases and others will be discussed hereinafter.

If the decision of the Court of Claims in *Utica Knitting Company vs. U. S.*, 68 Ct. Cls. 77 (certiorari denied 281 U. S. 739), were in conflict with the instant case, it would not be ground for granting the writ as prayed, in view of the harmony to be found in all other decisions. However, this decision of the Court of Claims has been distinguished on

the facts from a very similar case, decided by the Board of Tax Appeals after its decision in the instant case and while the instant case was pending in the court below. *(H. Liebes & Company vs. Commissioner,* 23 B. T. A. 787). The petitioner's position seems to be that despite the fact that all business of the subsidiary ceased and all business relations between the subsidiary and parent corporation were terminated at the final liquidation of the subsidiary on December 31, 1917, the fact that there was an interval of several weeks prior to formal dissolution of the subsidiary is sufficient to distinguish it from all other cases and to put this case and that of *Utica Knitting Company vs. U. S.* 68 Ct. Cls. 77 (certiorari denied 281 U. S. 739), in a class by themselves and in conflict. Petitioner is incorrect in this assertion, for several of the consistent cases cited by the court below and hereinafter discussed had the same pertinent facts. The case of *Utica Knitting Company vs. U. S.,* 68 Ct. Cls. 77 (certiorari denied 281 U. S. 739), was discussed by the Board of Tax Appeals in *H. Liebes & Company vs. Commissioner,* 23 B. T. A. 787, as follows:

[23 B. T. A. 791] "* * * In the *Utica Knitting Co.* case the court said:

> It would be an extremely technical evasion of the purpose of the statute [requiring consolidated returns] to hold that a conceded affiliation ceases when the subsidiary ceases to sell and manufacture goods, while at the same time the parent company owns all the stock of the subsidiary, and the subsidiary continues in business for the purpose of winding up its affairs, turning over its property to the parent, collecting its accounts and paying its debts, which very debts and accounts arose out of the knitwear busi-

ness in which both the parent company and the subsidiary were engaged.

It is clear from this quotation that the two cases are different. Here the subsidiary corporation had completely gone out of business before the end of the year and it had no property to turn over to the parent company.

While it may be that at the end of 1921 petitioner and the Ganss Fur Company were technically affiliated because petitioner still owned the stock, *a denial of a loss claim on account of that technicality would be to ignore the substance of the situation.* Had the petitioner sold the stock in 1921 for a nominal sum —which was all that could have been realized—the case would clearly come within the case *Remington Rand, Inc. vs. Commissioner,* 33 Fed. (2d) 77. The fact that petitioner failed to go out of its way to attempt to make a sale, when in all probability a bona fide sale could not have been effected, should not affect the result. In our opinion loss resulting from worthlessness should be treated no differently than loss resulting from sale and the situation is governed by the *Remington Rand* decision." (Italics ours.)

The facts in the instant case are almost identical with those in the case from which the above quotation is taken.

The only other conflict suggested by the petitioner is with the decision of the Circuit Court of Appeals of the Second Circuit in *Auto Sales Corporation vs. Commissioner,* 43 F. (2d) 931 (C. C. A. 2). Here, the petitioner does not claim a similarity of issues but merely claims that the court below erred in holding that affiliation applies only to corporations actively engaged in business. It is

submitted that the court below only held that the affiliation rules do not apply to a going corporation and its subsidiary which has been completely liquidated and is only awaiting completion of the formal and technical dissolution. In the *Auto Sales Corporation* case the opinion shows that the affiliate or subsidiary, as to whom affiliation was required, owned tangible and intangible assets, which the parent corporation claimed to be worth $1,348,557.50 (43 F. (2d) 932) and had outstanding mortgage trust bonds of a par value of $406,800 (43 F. (2d) 935) (which also indicates the existence of assets). These assets were apparently leased to the parent corporation (43 F. (2d) 935). The claim of conflict between the decision in the court below and the decision in *Auto Sales Corporation vs. Commissioner,* 43 F. (2d) 931 (C. C. A. 2), seems to involve a seizure of phrases from the opinions of the respective courts without regard to the contexts or the facts. Even on this narrow point, not only is there no conflict with the *Auto Sales Corporation* case, but also the decision of the court below is in harmony with *Wilmington Steamboat Company vs. Sturgess,* 52 F. (2d) 210 (D. C. N. J.) [affirmed 55 F. (2d) 831 (C. C. A. 3)], and *American Printing Company vs. United States,* 53 F. (2d) 98 (D. C. Mass.).

Thus the only two decisions which are even suggested by the petitioner to be in conflict with the instant case are disposed of; and, as hereinafter presented, the many harmonious cases, including those cited by the court below, are not distinguishable.

B.

The decision of the court below is in harmony with all other cases.

There are a number of decisions on facts similiar to those in the instant case, most of them being cited by the court below (r. 38). These cases include:

Remington Rand, Inc. vs. Commissioner, 33 F. (2d) 77 (C. C. A. 2) certiorari denied 280 U. S. 591.

United Publishers' Corporation vs. Anderson, 42 F. (2d) 781 (S. D. N. Y.).

Wilmington Steamboat Company vs. Sturgess, 52 F. (2d) 210 (D. C. N. J.) affirmed 55 F. (2d) 831 (C. C. A. 3).

American Printing Company vs. United States, 53 F. (2d) 98 (D. C. Mass.).

Canal-Commercial National Bank vs. Commissioner, 22 B. T. A. 541.

H. Liebes & Company vs. Commissioner, 23 B. T. A. 787.

Riggs National Bank vs. Commissioner, 17 B. T. A. 615, affirmed 57 F. (2d) 980 (C. C. A. 4).

Houghton & Dutton Co. vs. Commissioner, 26 B. T. A. 52.

Emerson Carey Fibre Products Co. et al vs. Commissioner, 26 B. T. A. ....., (July 19, 1932 Dockets 36381, 36382).

The petitioner, in his brief, asserts that, of these cases, those cited by the court below are distinguishable. He mentions in the cases of *Remington Rand, Inc. vs. Commissioner,* 33 F. (2d) 77 (C. C. A. 2) (certiorari denied 280 U.

S. 591), and *United Publishers' Corporation vs. Anderson,* 42 F. (2d) 781 (S. D. N. Y.), that these involved sales of the stock to outside interests as distinguished from liquidation and dissolution. This distinction is unsubstantial since, historically, amounts received in liquidation have been treated as if they were amounts received in sale of the stock. This treatment has been prescribed by the statutes themselves in each Revenue Act since that of 1918 where it first appeared specifically as follows in Section 201 (c) [2] of the Revenue Act of 1918 (Act February 24, 1919, c. 18, Title II, 40 Stats. 1057):

> "Sec. 201 (c) [2]. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

We do not understand that petitioner seriously contends that this rule does not apply to the year 1917. In fact, the petitioner apparently undertakes to distinguish these two cases on the ground that separate returns were filed for the period of the year ensuing after the sale of the stock. This ground for distinction was presented to the court below by the petitioner and was apparently regarded as unsubstantial, since the court cited these two cases as authority for its decision here. It was again and more specifically presented to the court below in the petitioner's petition for rehearing, which petition was denied without opinion.

Petitioner distinguishes the case of *Riggs National Bank vs. Commissioner,* 17 B. T. A. 615 [affirmed 57 F. (2d) 980 (C. C. A. 4th)] on the ground that the merger there was "equivalent to dissolution of the subsidiary" (p. 12 Peti-

tioner's Br.). He fails to state how the merger was equivalent to a dissolution and in fact the reported case before the Board of Tax Appeals, as well as in the Circuit Court of Appeals, fails to show when the dissolution did occur. On the contrary, the Circuit Court in that case, whose decision was made subsequent to the decision in the instant case, cited the instant case as authoritative for allowing the loss (57 F. (2d) 980, 983). Thus two of the Circuit Courts have concluded that the instant case should not be distinguished from that of *Riggs National Bank vs. Commissioner,* 17 B. T. A. 615 [affirmed 57 F. (2d) 980 (C. C. A. 4)].

The petitioner states that in *Canal-Commercial National Bank vs. Commissioner,* 22 B. T. A. 541, "there was an actual dissolution on the same day that the liquidation occurred" (Petitioner's Br. p. 13). The reported decision fails to show that this was the fact, but in any event the petitioner, who in that case taxed the gain which corresponds to the denied loss here, does not explain how this could be done in view of his argument here, since the liquidation occurred on the last day of the year, as in the case at bar, and there was an absence of the *separate* period whose presence in the three cases previously discussed is relied on by the petitioner to distinguish them.

In *American Printing Company vs. United States,* 53 F. (2d) 98 (D. C. Mass.), the petitioner shows that the subsidiary ceased to do business on December 31, 1917, as here, and was dissolved "soon thereafter". These facts, which exist here and are alleged to distinguish the instant case from others which have been discussed, nevertheless did not prevent the petitioner from subjecting the gain in that case to normal income taxes. It is true that the case came

into the courts on the question of the basic valuation to be allowed in 1919 on the property thus acquired and that the petitioner did not subject the gain to the excess profits tax, but the decision not only shows the petitioner had taxed the gain for normal taxes, but it specifically makes this the ground for refusing to allow the transaction to be treated as "intercompany". The fact that the case arose on the question of valuation of assets subsequent to the liquidation in no way distinguishes the application by the court of the principles which have been followed in the instant case.

The petitioner distinguishes *Wilmington Steamboat Company vs. Sturgess,* 52 F. (2d) 210 [(D. C. N. J.) affirmed 55 F. (2d) 831 (C. C. A. 3)] on the ground that the court there held that the cost of the subsidiary stock was such that there was no loss in fact, but nevertheless the District Court first squarely determined that the liquidation of the affiliated corporation was such an event as would warrant the deduction of the loss, if any had occurred.

The court below also cited *American Paper Exports, Inc. vs. Bowers,* 54 F. (2d) 508 (C. C. A. 2). This case does not involve facts similar to the instant case, but was cited by the respondent in its briefs below and by the court, on the erroneousness of petitioner's contention there that a separate tax period should have been recognized by the respondent for the fractional day subsequent to the breaking of the affiliation by the liquidation.

Subsequent to the decision of the Board of Tax Appeals in the instant case (which has since been reversed by the court below), the Board decided the case of *H. Liebes & Company vs. Commissioner,* 23 B. T. A. 787, and, without

citing its own decision in the instant case, held, on facts almost identical with the instant case and against the argument of the petitioner on the same issues as are here presented, that the loss should be allowed, distinguishing the case of *Utica Knitting Company vs. United States,* 68 Ct. Cls. 77 (certiorari denied 281 U. S. 739), as hereinbefore stated (supra p. 5).

Thereafter in *Houghton & Dutton Co. vs. Commissioner,* 26 B. T. A. 52, and in *Emerson Carey Fibre Products Co. et al vs. Commissioner,* 26 B. T. A. ....., (July 19, 1932, Dockets 36381, 36382), in each case, on similar facts, the Board held that the loss on liquidation should be allowed and specifically held that there was no material distinction between the case at bar and that before the Board, citing the decision of the court below reversing the Board in the instant case, as authoritative.

The Board of Tax Appeals does not always hold itself bound to follow a decision of the Circuit Court of Appeals. [*Riggs National Bank vs. Commissioner,* 17 B. T. A. 615 (620), (affirmed 57 F. (2d) 980) (C. C. A. 4); *Mrs. Frank Andrews vs. Commissioner,* 26 B. T. A. ....., (July 13, 1932, Docket No. 46734)].

It is apparent that the Board of Tax Appeals has accepted the decision of the court below in the case at bar as correct and in harmony with other cases and in so doing has receded from its primary position in the instant case.

II.

The Issues Arise Under a Statute Long Since Repealed. They Are Not of General Importance and Involve no Great Principle.

Petitioner asserts that the question of whether, in computing net income, intercompany transactions are to be disregarded under circumstances similar to those presented at bar is one of general importance affecting substantial sums and taxes and a number of taxpayers.

The instant case arises under Title II of the Revenue Act of 1917 (Act October 3, 1917, c. 63, 40 Stats. 300) Title II providing for War Excess Profits Tax. This form of tax applied only to the incomes of the years preceding 1922, as contained only in the said act, the Revenue Act of 1918 (Act February 24, 1919, c. 18, 40 Stats. 1057) Title III and the Revenue Act of 1921 (Act November 23, 1921, c. 136, 42 Stats. 227) Title III. It may be that a similar question might arise under the Revenue Act of 1924 (Act June 2, 1924, c. 234, 43 Stats. 253) Title II and the Revenue Act of 1926 (Act February 26, 1926, c. 27, 44 Stats. 9) Title II relative to consolidated returns for normal income tax. The question could not arise under the Revenue Act of 1928 (Act May 29, 1928, c. 852, 45 Stats. 795) Title I or the Revenue Act of 1932 (Act June 6, 1932) Title I for the reason that under Section 141 of each of those Acts the filing of consolidated returns is made a privilege upon condition that the affiliated corporations consent to all regulations prescribed by the Commissioner of Internal Revenue for determining the tax liability of an affiliated group and the petitioner is at liberty to prescribe his views on the question at issue as a condition to the privilege of filing consolidated returns. Consequently the petitioner is in

error in his petition in stating that "the question arises under all of the Revenue Acts since the Revenue Act of 1917" (Petition p. 6).

Under Section 275 of the Revenue Act of 1928 (26 U. S. Code § 2275) and under Section 277 of the Revenue Act of 1926 (26 U. S. Code § 1057), income taxes are required to be assessed respectively within two and three years after the return was filed. Consequently, the question in the case at bar arises under a form of taxation which has been non-existent for over ten years and which can arise relative to other forms of taxes only in the cases of those taxpayers who, by waiver or agreement, have waived the application of the said statutes of limitation. The question cannot arise as to any years that are open to assessment under the statute, except in the comparatively few cases of waiver or agreement as aforesaid.

The petitioner or his predecessors in office undertook to collect taxes on gains and prevailed under circumstances similar to those in the instant case on the ground that the sale or liquidation of the stock of a subsidiary was not an "intercompany" transaction. [*Remington Rand, Inc. vs. Commissioner,* 33 F. (2d) 77 (C. C. A. 2), (certiorari denied 280 U. S. 591); *American Printing Company vs. United States,* 53 F. (2d) 98 (D. C. Mass.); *Canal-Commercial National Bank vs. Commissioner,* 22 B. T. A. 541]. The petitioner or his predecessors in office have sought to deny deductions for losses under circumstances similar to those in the instant case and have in each instance been defeated [*Burnet vs. Riggs National Bank,* 17 B. T. A. 615, affirmed 57 F. (2d) 980 (C. C. A. 4); *Wilmington Steamboat Company vs. Sturgess,* 52 F. (2d) 210 (D. C. N. J.), affirmed 55 F. (2d) 831 (C. C. A. 3), where the loss was held allowable as a matter of law, but denied on facts; *Canal-Commercial National Bank vs. Commissioner,* 22 B. T. A. 541; *United*

Publishers' Corporation vs. Anderson, 42 F. (2d) 781 (S. D. N. Y.)].

The case of *Canal-Commercial National Bank vs. Commissioner,* 22 B. T. A. 541, has been mentioned above as one in which the petitioner was permitted to tax the gains and also has been listed as one in which the petitioner sought to deny the loss, for the reason that the Board of Tax Appeals first determined that the loss claimed by the taxpayer and denied by the Commissioner was allowable as a matter of law and then determined that, as a matter of fact, there was a gain instead of a loss in the transaction, as claimed alternatively by the petitioner.

The only case in which a transaction in any way like that here in controversy was held to prevent recognition of gain or loss was that of *Utica Knitting Company vs. U. S.,* 68 Ct. Cls. 77, certiorari denied 281 U. S. 739, which is distinguishable on the facts as hereinbefore set forth.

III.

The Decision of the Circuit Court of Appeals is Correct and Recognizes Substance as Well as Form.

This court in *The Farmers Loan & Trust Company vs. Minnesota,* 280 U. S. 204, said:

> [280 U. S. 212] "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. * * *"

Disregarding all discussion on form and considering only substance (although the respondent asserts that the decision below is correct on form as well as substance), the case at bar presents a situation on which the respondent

over a period of years advanced money in the course of its business operation to a subsidiary which lost the money. During the years in which the subsidiary lost the money, there was no consolidation of returns and the respondent did not have the benefit of the deduction of the subsidiary's losses from its income. The losses of the subsidiary which occurred in the year 1917, when consolidated returns were filed, are not claimed by the respondent as a loss, since it has had the deduction through the consolidation. The losses of the respondent's money as advanced to its subsidiary are allowable, if at all, only in the year 1917. As the court below said "In the instant case it is impossible to escape the conclusion that petitioner suffered a loss. That the loss was sustained in 1917, if at all, is admitted" (r. 37).

The petitioner seeks to deny for all time the deduction of the loss on the ground that its final form involved an "intercompany" transaction. *As the court below said, an intercompany transaction which is to be eliminated under the rules of the Treasury Department is one where a loss to one affiliate is represented by a gain to another and it held that the transaction here in question was not that type of intercompany transaction.* The word "intercompany" does not appear in the statutes at all. To apply this very proper departmental rule to transactions to which it was never intended to apply and cannot logically apply, is to apply the rule in a way which *defeats its very purpose* of determining the true taxable income. This is proposed merely because of the language in which the rule is couched. It is submitted that the petitioner seeks to pursue form, and erroneously, to the denial of substance, and contrary to both the letter and the spirit of the statutes.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct. It is in harmony with all of the cases containing similar facts. The questions at issue are not of general importance and can arise only as to years as to which the statutes of limitation have run.

The respondent has endeavored for over ten years of controversy with the petitioner or his predecessors to secure a final determination of its 1917 taxes in accordance with its view of the law. The decision of the Circuit Court of Appeals is just. It is submitted that the controversy should be ended by a denial of the petition for certiorari.

Respectfully submitted,

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